POLICE OFFICER'S HANDBOOK

NOTICE OF TRIAL
IN TRAFFIC CASES

SEIZING PORNOGRAPHIC
FILM AS EVIDENCE

JURY REQUIREMENTS
IN TRAFFIC COURTS

FLEMING'S NOTEBOOK...Chapter 92

Probation Revocation (For Traffic Violation?)

Prepared under the direction of E. Fleming Mason Producer of Crime-to-Court ETV Law Enforcement Informational Programs, in cooperation with South Carolina Educational Television Network with funds provided through the South Carolina Criminal Justice Academy.

LAW ENFORCEMENT - ETV TRAINING PROGRAM

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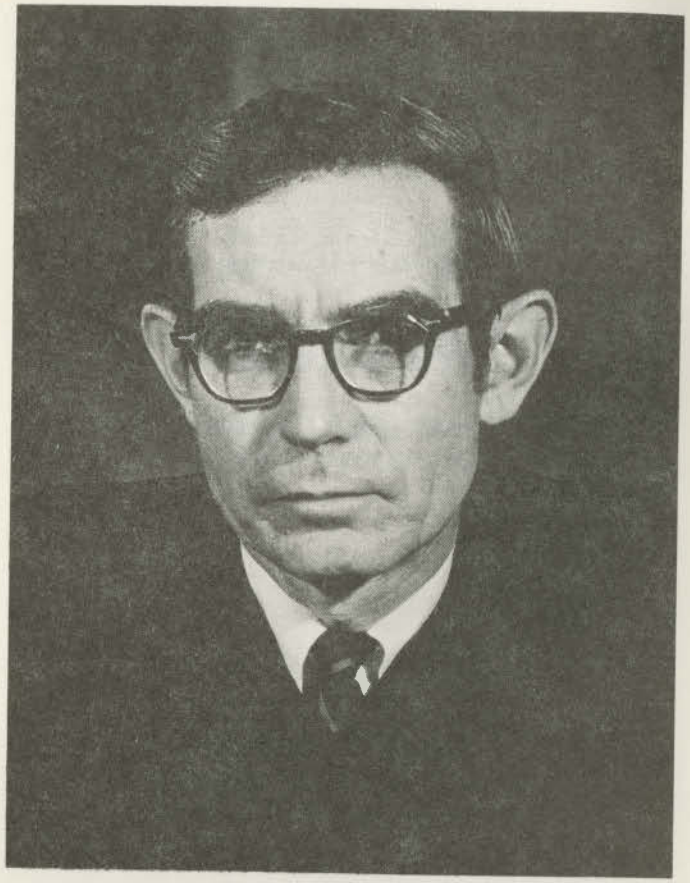

Hon. Francis B. Nicholson
Resident Judge
Eighth Judicial Circuit

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FOREWORD

The South Carolina Supreme Court has recently called attention to the necessity of giving proper notice at time and date of trial to defendants whose cases are continued beyond the time shown on the traffic ticket. Informal methods that do not lawfully constitute legal notice will be examined closely in the future by the Court. The time has come when it is essential for all magistrates and municipal judges to keep some permanent records of transactions that take place in their courts. It is not sufficient to say that no specific statute requires this record or that Constitutional due process requires substantive court procedures, whether specifically demanded by statute or not.

Enforcement of State laws against obscene films, books, magazines, and other materials has always been a ticklish business because of First Amendment guarantees of freedom of expression. Recently, the United States Supreme Court made a basic change in its position in the act by saying that local, rather than national standards

could be applied in deciding whether or not specified types of materials offended the community sense of decency. A few days later, the Court decided another case that simplified permissable methods of obtaining a seizure warrant for obscene films and other materials for evidence purposes. The latter decision will be discussed in detail. This handbook also goes into the details of the matter.

Francis B. Nicholson
Resident Judge
Eighth Judicial Circuit
State of South Carolina

SEIZING PORNO FILM FOR TRIAL EVIDENCE

The decisions of the Federal Courts on the question of seizure of obscene material have been so changing from one time to the next that it has been next to impossible for police officers and local judges to know when seizure could be made lawfully. It was indicated at one time by the United States Supreme Court that there could be no seizure of any subject material unless there was a prior full-scale hearing before a judge to determine whether or not the material was, in fact, obscene. Books v. Kansas, 378 US 213. This left the enforcement officer helpless until there could be arranged a 'trial' to tell him that the material was obscene and could be seized.

HELLER RULE

Now the United States Supreme Court says that it did not intend the old rule to apply when subject material was being seized as evidence only...and not for the purpose of preventing its display or sale or of destroying it. Heller v. New York, 41 LW 5067. In such a case, the Court said, there must be a finding by a judge that the material is obscene, a search and seizure warrant must be issued, but there need be no 'trial' or hearing to determine obscenity. The judge may make such a finding without a hearing.

FACTS

Police officers viewed a movie and determined it to be obscene. They telephoned the DA's office, and, in turn, a local judge was contacted. He agreed to come to the theatre and see the film. Upon viewing the film, the judge determined it to be obscene and issued a written seizure order on the spot. Officers seized one copy of the film as evidence and arrested the manager. At trial, the film was used as evidence and the manager was convicted. He appealed...arguing among other things that the film was illegally seized and, therefore, could not be used as evidence, because there had not been a full-scale hearing before a judge prior to seizure.

COURT RULING

The Supreme Court held that seizure of the film for evidence purposes in these circumstances was all right. A judge with power to issue search and seizure

warrants had seen the film and determined that it was obscene. He issued a warrant based on his own observations. The Court had these things to say about such seizures:

(1) Such a seizure could be made for purposes of obtaining evidence only.

(2) Until there is a full-scale hearing or trial, at which the operator can be represented, and a finding by judge or jury that the film is obscene, copying of the film should be permitted, if there is such a request made, for continued showing pending the result of the hearing or trial.

(3) Such seizure before full-scale hearing or trial is prohibited if the purpose of the seizure is to prevent further showing, display, or sale of the material. When the seizure is for this purpose, there must be a prior full-scale hearing before a judge.

SEIZING PORNOGRAPHIC MATERIAL FOR EVIDENCE WITHOUT VIEWING BY A JUDGE

In a case from Kentucky decided the same day as the Heller case, the Supreme Court held that seizure of pornographic film by a police officer for evidence purposes without a seizure warrant from a judge was unlawful. Roaden v. Kentucky, 41 LW 5070.

FACTS

A Kentucky county sheriff viewed a film and decided it was obscene. He arrested the operator without a warrant for committing a misdemeanor in his presence, and seized the film incident to the arrest for purposes of evidence at trial. The film was admitted in evidence and the operator was convicted of violating Kentucky's law against public display of obscene material. He appealed.

SUPREME COURT RULING

The Supreme Court held that the arrest of the operator was lawful, but that seizure of the film was not...because there had been no prior determination by a neutral judge that it was obscene. Because the film was unlawfully seized, it could not be used in evidence against the operator. The conviction was reversed.

QUESTIONS NOT ANSWERED BY THE HELLER AND ROADEN CASES

Two important questions relating to seizure of allegedly obscene material were left unanswered by the Court. (1) Is it necessary for a judge to view the subject material personally...either in court or at a theatre or store...before he can issue a seizure warrant upon the affidavit of an officer describing the material? The Court in Heller called attention to the fact that it has never said that personal viewing by the judge is necessary, but the opinion stopped there. It did not

say that personal viewing was not necessary. (2) Is an obscenity law similar to South Carolina's too vague and general to be valid? New York's obscenity law is very similar to South Carolina's law. Neither sets forth the specific acts it is intended to prohibit, as the case of Miller v. California said a valid law must do. This question as to the New York law was sidestepped by the Court, which sent the case back to New York for a decision on the question.

When obscene material is seized for evidence purposes upon viewing by a judge (without a full-scale hearing), a reasonably speedy trial should be afforded the defendant...unless the defendant himself, or his attorney, causes the delay. Heller.

TRAFFIC COURT JURIES

Very little attention has been paid in the past to whether or not jury boxes in municipal courts were properly made up and maintained on a current basis. The same thing can be said of the drawing of magistrate's juries.

Recently, more and more cases are being challenged on the ground that statutory provisions with regard to jury boxes are being ignored. When proper objection is made, defective jury boxes and defective procedures for providing prospective jurors can be fatal to the lawfulness of a conviction.

All magistrate's juries must be drawn in the same way, of course...and the procedure prescribed by the Code must be followed unless waived by both the State and the defendant.

MAGISTRATE'S JURIES

§43-116. HOW JURORS SELECTED. In criminal causes in a magistrate's court a jury shall be selected in the following manner: The sheriff, constable or other officer appointed by the magistrate shall write and fold up eighteen ballots, each containing the name of a respectable voter of the vicinity. He shall deliver the ballots to the magistrate, who shall put them into a box and shake them together, and the officer shall draw out one, and the person so drawn shall be one of the jury unless challenged by either party. The officer shall thus proceed until he shall have drawn six who shall not have been challenged. Neither party shall be allowed more than six challenges. But if the first twelve drawn shall be challenged and the parties do not agree to a choice, the last six shall be the jury. When any of the six jurors so drawn cannot be had or are disqualified by law to act in the case and the parties do not supply the vacancy by agreement, the officer shall proceed to prepare, in the manner before directed,

ballots for three times the number thus deficient, which shall be disposed of and drawn as above provided.

The Code sets out varying provisions for jury boxes for cities and towns, depending upon the population of the municipality. Also, there are many special laws for specific cities and towns.

MUNICIPAL JURY BOXES

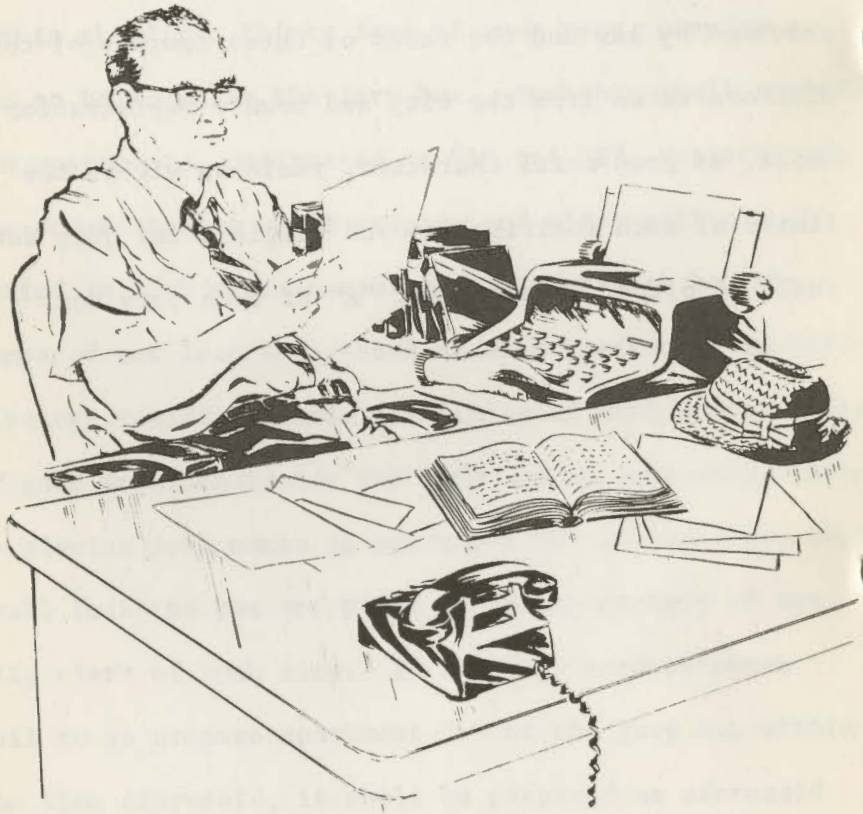
§15-941. JURY COMMISSIONERS AND DUTIES THEREOF. The mayor and aldermen or councilmen in any city or town in this State containing by the last census less than five thousand inhabitants are hereby declared to be the jury commissioners of the municipal court of such city or town and they shall, on or before the first day of May of each year, prepare a box to be known as the "Jury Box" which shall contain two apartments designated as A and B, respectively, and shall prepare and place prior to such date in each year in apartment A of such box the names of not less than seventy-five per cent of the qualified electors of such city or town of

good moral character and eligible to jury duty. After so placing such names in such apartment A, the mayor or presiding officer of such court shall lock the box and keep it in a place of safety.

§15-953. JURY BOX. The jury commissioners shall, within the first thirty days of each year, prepare a box to be known as the jury box. Such box shall contain two apartments, designated as "A" and "B", respectively. The commissioners shall prepare and place within such period in each year in apartment "A" of such box the names of not less than three hundred residents, qualified electors residing within the limits of such municipality, of good moral character and eligible to jury duty. After so placing such names in apartment "A" of such box, they shall lock the box and place it in the custody of the city clerk of such city. If the jury commissioners fail to so prepare apartment "A" of the jury box within the time aforesaid, it shall be prepared as aforesaid within ten days from discovery of the failure to so prepare it or on notice from anyone in interest. Such jury box when so prepared shall be used until the next jury box is prepared.

§15-954. SAME; WHEN LESS THAN THREE HUNDRED ELIGIBLE FOR JURY DUTY. In any city or town in which there are less than three hundred qualified electors residing within the limits of such municipality and eligible to jury duty, such box shall be prepared as provided by law and the names of three fourths of the electors taken from the city and county registration books, of good moral character, residing within the limits of such municipality and eligible for jury duty, shall be placed in apartment "A" of such jury box.

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 92:

PROBATION REVOCATION

Minor traffic violation is not sufficient upon which to revoke probation. Douglas v. Buder, 93 SC 2199. Thompson v. Louisville, 362 US 199.

OBSCENITY - DESCRIPTION

WITH NO PICTURES

Word description of sex acts may be obscene. Pictures or drawings are not necessary to constitute the crime. Kaplan v. California, 13 CrL 3194.

SEARCH OF CLOTHING

OF ARRESTED SUSPECT

Fleeing suspects were arrested near a post office where a silent alarm had gone off...Cruising police officers arrested the suspects, then took paint samples

from window that was point of entrance. While suspects were in jail, their clothing was examined without their consent and without a warrant...matching paint samples were found.

COURT RULING: Search of clothing was unlawful. Search warrant should have been obtained. There was no danger of the evidence getting away because of the short delay necessary to obtain a warrant. US v. Edwards, 474 F2d 1206. US Court of appeals, 6th Cir., Ohio.

SEARCH OF APARTMENT

DURING DRUG RAID

Police made lawful forced entry into suspect apartment and arrested occupant on drug charge. Without Miranda warnings, police asked occupant where shopping bag was they had seen brought into the apartment. Suspect pointed to a closed closet door across the room. Police opened closet door and found shopping bag containing heroin.

FEDERAL COURT RULING: Seizure of heroin was unlawful because made without a warrant. The closed closet was too far from the arrested suspect to justify search incident to arrest. Evidence not admitted.

COMMENT: Police could have remained in the apartment until a search warrant was obtained, then searched the entire apartment. US v. Mapp, 2nd Cir., US Court of Appeals, NY.

PRELIMINARY HEARING...

PRESENCE OF DEFENDANT REQUIRED

A preliminary hearing must be open to the public and the defendant must be present at all times, even though his lawyer is present. US v. Clark, 475 F2d 240, USCA, NY.

SEARCH BY PRIVATE PERSONS

An airline employee made a warrantless search of a package sent by air freight, finding pornographic

material. He was not working with police.

RULING: A warrantless search and seizure by a private individual not working with police does not make the evidence found inadmissable, even though the search might have been unlawful. US v. Harding, 475 F2d 480, 10th Cir., USCA, Colo.

SEARCH OF CAR AT STATION WITHOUT A SEARCH WARRANT

Motorist was stopped for speeding...license plates on car looked suspicious...radio check showed plates were registered to another car. Motorist was taken to jail and car was searched thoroughly without a warrant, revealing evidence the car was stolen.

RULING: Search was OK, even though owner was in jail and there was time to obtain a warrant. US v. Beasley, 476 F2d 164; Chambers v. Maroney, 399 US 42.

CAUTION: This rule is sound for two reasons: (1) Automobile was involved. (2) Search was made very soon after the arrest. A search without a warrant the next day or later frequently is held not to be protected unless a search warrant is obtained.

NARCOTICS ARREST AT MOTEL

Narcotics agents, learning that known narcotics dealers were at a motel, got an adjoining room. They were able to hear conversation indicating presence of narcotics. Agents stationed themselves outside motel room door of suspects and waited. When door opened, they went inside, seized narcotics in plain sight, and arrested the occupants.

RULING: Arrests and seizure lawful. Police must announce presence and demand entrance only when door is closed. US v. Lopez, 476 F2d 89.

STATEMENT OF SUSPECT MADE AFTER INITIAL REFUSAL TO TALK

Suspect was arrested and given Miranda warnings. He refused to talk and said he wanted a lawyer. Later,

the suspect made a statement to police that did not result from police questioning.

RULING: Statement was admissable, notwithstanding initial request for counsel. Suspect waived right to remain silent. US v. Anthony, 474 F2d 770, USCA, Ga., 5th Cir.

QUESTIONING BY PRIVATE PERSONS

Forgery suspect was asked to come to private store for questioning by store employees about forged checks. He was prime suspect, but was not under arrest. No Miranda warnings were given. Suspect confessed. Statement was used at trial.

RULING: Statement admissable. Miranda warnings not required when questioning is done by private individuals not working with police. US v. Casteel, 476 F2d 152, USCA, 10th, Kan.

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